No. 11,632

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

W. COBURN COOK, as Trustee,
Appellant,

vs.

BAXTER CREEK IRRIGATION DISTRICT and the Landowners, H. J. CLARK, LURLEY CLARK, LEONORA M. BAILEY, LYAL ZEITLER, GEORGE MCROREY, RACHEL MCROREY, MR. AND MRS. E. A. BLICKENSTAFF and JAMES N. FARRELL and AMY L. FARRELL,
Appellees.

BRIEF FOR APPELLANT.

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JURISDICTIONAL FACTS AND PLEADINGS.

This proceeding is a petition for composition of debts of the Baxter Creek Irrigation District, an irrigation district organized under the provisions of "the California Irrigation District Act" of the State of California approved March 31, 1897, and acts amendatory thereof. The proceeding is authorized under the provisions of Chapter IX of the Bankruptcy Act of 1898. (11 U.S.C.A., Secs. 401-404.)

The jurisdiction of this Court in this appeal is under Sections 24 and 25 of the Bankruptcy Act of 1898 as amended June 22, 1938.

The petitioner herein (appellee district) filed its petition for confirmation of composition September 17, 1945. (R. 2, 9.)

The other appellees are landowners whose lands it is claimed by appellant were within the boundaries of the Baxter Creek Irrigation District and subject to its debts, whether now within the district or excluded.

The appellant was designated and appointed Trustee for Creditors by the District Court by its interlocutory decree entered January 3, 1946 (R. 60, 61) and was directed to carry out the terms of the plan of composition and to apply to the Court for instructions. (R. 60.)

The appellant applied to the Court for instructions and an order for authority to commence a proceeding against the landowners who are appellees herein for the purpose of determining that their lands are subject to the assessment for the indebtedness involved in the composition proceeding and to determine whether the lands should be required to come within the terms of the composition agreement, or whether title should be obtained to said lands for nonpayment of the assessment. (R. 89-91.)

The application was heard before Honorable Roger T. Foley, United States District Judge, who on March 17, 1947, entered a decision denying the Trustee's ap-

plication and determining that the matter was *res judicata* in the case of *Pueblo Trading Co. v. Baxter Creek Irrigation District,* 61 Fed. Supp. 589. (R. 98.)

STATEMENT OF THE CASE.

Throughout this brief the Baxter Creek Irrigation District will be referred to as the "district" and the other appellees will be referred to as the "landowners".

The proceeding is under the Municipal Bankruptcy Act of the United States, Title 11, Sections 401-403, U.S.C.A. The Baxter Creek Irrigation District is an irrigation district organized under the laws of the State of California and a public agency. The basis of the composition proceeding is a contract made between W. Coburn Cook, referred to as the Trustee, and the Baxter Creek Irrigation District on August 28, 1945. (R. 62.) On January 3, 1946, Judge Martin I. Welsh entered an interlocutory decree confirming the contract as a plan of composition. (R. 50, 61.)

In resumé of the plan of composition it may be stated that a Bondholders Protective Committee was formed June 1, 1926 (R. 17) representing some 79% of the creditors of the district. The committee pursuant to its authority entered into a contract with W. Coburn Cook (R. 18, 23) which agreement authorized Cook to negotiate a plan of composition.

The composition agreement which was negotiated by Cook with the district recited that the debts of the

district consisted of $511,000 of interest bearing bonds and $52,220.93 principal amount of warrants. (R. 62, 63.) The main provision of the composition agreement was that the landowners should individually be entitled to redeem their respective parcels of land at stated figures as set forth in an exhibit called Exhibit "B" (R. 65), and that upon default in such payment prior to April 24, 1947, the district would undertake to acquire title to all unredeemed lands and all other lands and convey the same to the trustee, together with all other assets and properties of the district except its actual books, seal and records. (R. 70, 71, 73.)

At the time the agreement was drawn it seems to have been assumed that certain lands belonging to the United States of America were not subject to assessment and these parcels were not included in the land to be redeemed. Also there was a certain block of land which had actually never been assessed and which was in private ownership. This block of land belonged to several landowners, the individual appellees or their predecessors herein, and their lands were separately listed in a schedule called "Schedule C" (R. 14, 84) which contained a notation: "If U. S. District Court rules the following lands are not within the Baxter Creek Irrigation District they will not be considered as part of Exhibit 'B'." Redemption figures were set forth opposite the names of the landowners and descriptions of the properties. The apparent reason for the non-assessment of these lands in years past was the assumption that they had been legally excluded from the boundaries of the district at a time when, if

excluded, they would not be liable to assessment for the debt of the district. It is in relation to these so-called excluded lands that this controversy arises.

Section 20 of the Interlocutory Decree (R. 58) provides:

> "That this Court further hereby reserves the right and retains exclusive power and jurisdiction by appropriate order or orders hereafter entered to provide for and to carry out said Plan of Composition under and subject to the supervision and control of this Court and hereby specifically retains and shall have the exclusive jurisdiction of said cause and said Plan of Composition. That the debtor Baxter Creek Irrigation District or the Trustee may from time to time apply to this Court for such other order or orders as may be necessary to carry out and make effective this Interlocutory Decree and this Court hereby reserves and shall have full and complete jurisdiction of said Plan of Composition."

Section 27 of the Interlocutory Decree (R. 60) provides:

> "W. Coburn Cook named in the plan is designated and appointed Trustee for creditors herein and authorized to carry out the terms of the plan of composition, and he may apply to this Court for orders of assistance to that end or for instructions, upon notice to the petitioner."

These two sections were the basis for the proceedings in the District Court as a result whereof this appeal is taken.

The trustee, acting on behalf of all creditors, deemed it his duty to commence a proceeding to determine, which the District Court had not done at the hearing on the plan of composition, whether the so-called "excluded" lands were subject to the indebtedness of the district and therefore should be embraced within the plan of composition or conveyed to the trustee, and also to determine whether the government lands referred to should be likewise considered and handled.

The application therefor was dated October 24, 1946 (R. 89) and was submitted to Honorable Roger T. Foley upon a minute order made November 4, 1946.

Judge Foley ruled on March 17, 1947:

1. That the decision of Judge Welsh in *Pueblo Trading Co. v. Baxter Creek Irrigation District* was an adjudication of the application here made relating to the privately owned lands. That it was binding on the irrigation district and any person asserting rights through or under the district.

2. That the trustee be permitted, however, to take proceedings to obtain a determination of the status of the government lands.

No appeal has been taken from ruling No. 2.

By so determining Judge Foley has held in effect that both applications were made *timely* and that the relief sought was *proper,* but held under item 1 that as to the so-called "excluded lands" the cause was *res judicata.* In so determining, Judge Foley stated:

> "In the action Pueblo Trading Co. v. Baxter Creek Irrigation District, 61 F. Supp. 586, H. J.

Clark, Lurley Clark, Lenora M. Bailey, Lyal Zeitler, George McRorey, Rachel McRorey and Lyman Dermott Stiles filed a petition for an order to show cause for relief from the assessment, the subject matter of the action. Mr. and Mrs. G. A. Blickenstaff are successors in interest to the above named Lyman Dermott Stiles. In that action Judge Welsh held as follows:

> " 'It is therefore held that the lands of the aforesaid petitioners herein, and each of them, are not located within the boundaries of the Baxter Creek Irrigation District, defendant in above entitled action, are not subject to the indebtedness of said defendant, and are not liable or subject to assessment by said defendant, the Board of Supervisors of Lassen County, California, the Assessor, Tax Collector, Treasurer, or any other officer of said County, or any of them, to pay the judgment rendered in the above entitled action; and
>
> " 'It is hereby further ordered that the order heretofore made herein on the 26th day of September, 1944, requiring that the Board of Supervisors and officers of Lassen County, California, prepare an assessment roll of said lands and assess said lands for the payment of the judgment in the above entitled action be amended so as to exclude the property described in Exhibit "A" attached to the petition filed on the 2nd day of April, 1945.'

"The decision of Judge Welsh in Pueblo Trading Co. v. Baxter Creek Irrigation District is an adjudication pronounced upon the status of the property of the above named owners in its relation to the Baxter Creek Irrigation District and

> is a holding by a competent tribunal that said property is not included within the Baxter Creek Irrigation District and such adjudication is binding on the irrigaton district and any person asserting rights through, or as successors in interest to, or by virtue of the irrigation district. The above named landowners should not again be required to meet the expense and inconvenience of newly instituted proceedings to determine the same questions decided by Judge Welsh in their favor in the Pueblo Trading Co. case, supra." (R. 94, 95, 96.)

Pueblo Trading Co. was one of the creditors of the Baxter Creek Irrigation District holding a relatively small amount of indebtedness. In an action in the United States District Court it obtained orders requiring the supervisors of the county to levy assessments upon the lands of the district, the board of directors of the district having ceased to act or exist and so having failed to levy such assessment. The facts are pretty well set forth in the decision of Judge Welsh which appears in the cited case of *Pueblo Trading Co. v. Baxter Creek Irrigation District,* 61 Fed. Supp. 586. This was all prior to the composition agreement or proceeding. A considerable quantity of land was found to have been omitted from the assessment roll, and a supplemental order was obtained in the *Pueblo Trading Co.* case requiring the supervisors to levy additional assessments, this order providing that any aggrieved landowner could apply to have his lands excluded from this supplemental assessment. The appellees here made such application in that case

and the Court after a hearing in that case ordered the lands excluded from the assessment. No appeal was taken from the order. It may as well be conceded that none of the facts we are stating in this paragraph are of record except inferentially, and we may as well go on therefore to state that the reason no appeal was taken was because plaintiff considered that whatever decision was made would not be binding in any other proceeding anyway.

At the hearing on the plan of composition, counsel for the district offered to introduce into evidence the record in the *Pueblo Trading Co.* case (R. 102) and certain discussion followed, part of which is as follows:

> "Mr. Dill. I would like to call attention to one provision in the Baxter Irrigation District—in their plan—in which there are certain parcels of land that are listed and the redemption values given, and at the top of this schedule there is a provision in the plan that if the United States District Court hold that these lands are not within the boundaries of the district they will not be redeemed.
>
> The basis of this provision, of course, was that in the Pueblo v. Baxter Creek Irrigation District case, No. 4915—you no doubt remember the hearing that Mr. Cook and myself had, and you made certain orders in that case. At this time, your Honor, I would like to introduce in evidence those orders that were made.
>
> Mr. Cook. To which I wish to object. This point, if your Honor please, resolves itself this way: When these contracts were signed, Exhibit

B containing the land schedules were not attached to the contract—they were subsequently attached —and I don't believe I was aware of the statement on there that the District Court would determine whether this group of land should be excluded or not.

It is true that in the Pueblo Trading Company case your Honor decided that they were not subject to assessment and of course the Pueblo Trading Company is bound by that, but I am appearing in this case today for the Bondholders' Protective Committee. They were not parties to that and I rather question whether the District Court can determine the question of whether so far as the district is concerned these lands are excluded lands.

I suggest, however, that it might be proper for the Court here to make some suggestion or order as to how this matter should be determined. I would suggest that the Superior Court in Lassen County is probably the proper court to determine that question, and that the Trustee in the decree might be directed to either quitclaim to these parties within a period of 90 days or else to bring an action in the Superior Court of that county to determine whether they are in the district or not. But so far as this proceeding is concerned, I object to the introduction of this judgment on the ground that it is not binding upon the Bondholders' Protective Committee." (R. 102, 103.)

At that time Mr. Dill also stated:

"Mr. Dill. Now, in line with Mr. Cook's statement that as to the last plan that when he signed

it the schedule was not attached, I believe he is correct." (R. 104.)

And Mr. Cook also stated:

"And it just seems to me that that question can be determined, if your Honor feels it has to be determined in this Court, at a subsequent time on the application of these landowners themselves—Mr. Dill is not appearing for them here; * * *" (R. 105.)

"* * * and I am pleading with the Court to deny the introduction of the evidence and to make some order that will permit any landowner to come in here and present his case at a later date regardless of the plan of composition determined to be fair and so forth, * * *" (R. 106.)

The "question" was the one of the status of the so-called "excluded" lands.

At the conclusion of this discussion the judge admitted the record in the *Pueblo Trading Co.* case as Exhibit 30. (R. 108.)

What then followed was of the greatest importance, and is, we will hereafter argue, determinative of this case. A recess was taken (R. 109) and upon readjournment Mr. Dill stated:

"Your Honor, there has been some discussion about the offer of proof that I made of certain records of the Pueblo Trading Company and I have been authorized by the Baxter Creek Irrigation District to withdraw those orders because perhaps of some possible question of appeal from

those orders and rather than hinder the approval of this plan, if agreeable with the Court, I wish to withdraw them."

The exhibit was thereupon withdrawn.

SUMMARY OF ARGUMENT.

The so-called excluded lands of the appellee landowners were made subject to the plan of composition unless the United States District Court should rule in the pending proceeding that they were not within the Baxter Creek Irrigation District and therefore not subject to its indebtedness. (R. 84.) The district attempted to make a showing that they were not so subject by its offer to introduce the record in the *Pueblo Trading Co.* case. But this offer was withdrawn. (R. 109, 110.) There was therefore no record before the Court of the proceedings in the *Pueblo Trading Co.* case, and the matter as to whether these lands were included within the district's boundaries was wholly undetermined so far as the composition proceedings was concerned. This was a matter which had subsequently to be determined and it was therefore proper that the trustee should apply to the Court for such determination, and in denying the trustee a hearing on this matter and in ruling that the cause was *res judicata,* the District Court erred.

I. THERE WAS NO PLEADING NOR RECORD OF THE DECISION IN THE PUEBLO TRADING CO. CASE BEFORE THIS COURT IN THESE PROCEEDINGS.

No pleading of any kind was filed in response to the application for an order and for instructions. Nor was there any pleading in the main bankruptcy case except the statement that *if* the Court rules these lands in Exhibit C properly excluded they shall be so considered. (R. 14, 84.)

There was no record of the judgment or of the proceedings in the *Pueblo Trading Co.* case before the U. S. District Court at any time. This is shown in the statement of the case made above. (15 *Cal. Jur.,* p. 208.)

It is of course elemental that whether pleaded or not, the record of the adjudication must be introduced into evidence.

II. IT WAS THE DUTY OF THE DISTRICT COURT TO GRANT THE ORDER PERMITTING THE TRUSTEE TO PROCEED TO DETERMINATION OF THE ISSUE.

This is really shown by the record which, if it indicates anything at all, indicates that the District Court, and of course that meant District Court sitting in this cause, was to determine whether the landowners' properties were within the district and subject to the debts thereof or not. (R. 14.)

The District Court *did not make this ruling,* and entered its interlocutory decree upon the request of counsel on both sides without such ruling because it

was feared that an appeal from the interlocutory decree would surely be taken and that such appeal would suspend for a long period of time the operation of the plan of composition, and consequently, if this controversial measure should be determined at a later date, the plan of composition itself could proceed smoothly on its main points. This actually is what happened. As a matter of interest, the great majority of the landowners have redeemed their property and the execution of the plan of composition is rapidly approaching its normal termination, except for the determination of a relatively few points, one of which is this question of excluded land. The trustee is acting in good faith and in the interest of the creditors in seeking a determination of the matter. It was upon his own determination (not as trustee but as counsel for one creditor) that his client did not appeal the *Pueblo Trading Co.* case, for while he considered that he had good reason to believe that he could obtain a reversal of the decision in the *Pueblo Trading Co.* case he concluded that such action would not be binding upon all the parties to the then prospective bankruptcy proceeding.

When the hearing upon the plan of composition was held it was the trustee's wise determination that this controversial issue should not be determined at that time so as to avoid appeal. After the entry of the interlocutory decree he waited a reasonable time to see whether the landowners would avail themselves of the provision specifically inserted in the contract and in the interlocutory decree for their benefit which pro-

vided that any landowner might, prior to April 24, 1947, litigate the question as to whether their lands were properly included in the plan of composition. Paragraph VII of the Plan of Composition (R. 81) provides:

> "The United States District Court shall have the power to make all necessary corrections as to the aforementioned matters after being advised by competent evidence and statement as to the true facts."

This refers to mistake as to name or identity as to person and mistake as to the description of any tracts, and the question whether any tracts are subject to assessment to pay this indebtedness.

By Section 26 of the Interlocutory Decree (R. 60) the Court provided:

> "That the present or future owners of any of the tracts of land subject to this Plan may take advantage of Paragraph VII of the Plan of Composition in this Court or in any other competent Court at any time prior to April 24, 1947",

thereby recognizing the Court's obligation to determine all such matters in the future. But the Court failed to decide the present question whether the lands involved were subject to the indebtedness of the district or not by denying the Trustee's application for an order permitting him to bring this matter on for decision.

III. THE NECESSARY ELEMENTS FOR A PLEA OF RES JUDICATA ARE ABSENT.

We do not of course concede that the Court was entitled to consider the effect of the Pueblo Trading Company's decision. But if it was proper for the Court to consider it, then the Court erred in determining that as to the *Pueblo Trading Co.* case "such adjudication is binding upon the irrigation district, and any person asserting rights through or as successor in interest to or by virtue of the irrigation district. The above named landowners should not again be required to meet the expense and inconvenience of newly instituted proceedings to determine the same questions decided by Judge Welsh in their favor in the Pueblo Trading Co. case, * * *". (R. 95, 96.)

We believe the thinking here is somewhat mixed. True, there was a decision in the *Pueblo Trading Co.* case, but it was a decision between one creditor, the Pueblo Trading Co., and the Baxter Creek Irrigation District. It is of course binding upon those parties between themselves. The opinion of Judge Welsh also is a matter of some authority which could be cited in any similar or subsequent litigation. But that does not change the rule that there must be identity of parties in order to permit the use of a judgment upon proper plea or in evidence upon the theory of *res judicata* or in estoppel.

35 *C. J.* 756 states:

> "To make a former judgment a bar to the maintenance of a present suit, it must have been rendered in an action between the same parties or between those in privity with them. * * *"

Also explaining:

> "The privity in respect to the subject matter which is essential to render a judgment operative as a bar to a subsequent action by another plaintiff upon the same cause of action implies relationship by succession or representation between plaintiffs in the two actions in respect to the rights adjudicated in the prior action."

The Baxter Creek Irrigation District and the purchasers of the bonds are two different and distinct sets of parties to the contract. It has been held that the bond is a contract between the landowners and the bondholders. (*Hershey v. Cole,* 20 Pac. (2d) 972, 130 C. A. 683.) The irrigation district is more identified with the landowners than it is with the bondholders. There may be privity or identity of parties between the landowners and the district, but none between the irrigation district and the creditors. The creditors are on the other end of the contract. Unless the creditors can be bound by the decision in the *Pueblo Trading Co.* case by reason of their identity with the plaintiff, then they cannot be bound at all, and the District Court, in holding in effect as above indicated that the bondholders are all bound because they take as successor to the irrigation is, we submit, error.

Again, however, the argument comes back to the point that *counsel for the district at the hearing in the bankruptcy proceeding before Judge Welsh determined for good and proper reason that the matter of the exclusion of the particular lands in question should be a matter for subsequent determination* and at any rate should not be a matter for determination at that

time. *The fact that Judge Welsh did not in the entry of the interlocutory decree specifically determine this matter is a very cogent reason for now considering that he did not intend to pass upon it* and that he intended to reserve that as a matter for subsequent decision upon application thereafter to be made.

CONCLUSION.

It is respectfully submitted that the lower Court erred in determining that the matter of the excluded lands was *res judicata.* This conclusion it had no right, we submit, to make as the record was not before it, either by pleading or as a part of the evidence. The matter was clearly intended for subsequent consideration and decision by the District Court, and the parties had so agreed in open court. It is respectfully submitted, therefore, that the order of the District Court denying the trustee's application for instructions or for an order to proceed to a determination of the issue should be reversed and the District Court should be directed to proceed now to determine the question as to whether the lands are or are not excluded, or to direct the trustee to bring proceedings in the state court for determination of the issue as the trustee may determine.

Dated, Turlock, California,
July 30, 1947.

W. Coburn Cook,
Attorney for Appellant.